IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1731

STATE OF NEW MEXICO and JAMES R. BACA,
Director, Department of Alcoholic Beverage Control,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF

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ARGUMENT

Most of the argument of the United States has been addressed in the Petition, and we will not restate our position here. Some points in the Brief in Opposition, however, warrant a further response.

1. The United States argues that, in the absence of an unambiguous expression of Congressional intent, States may not license or tax Indians on an Indian reservation. According to the United States, Section 1161 does not clearly express Congressional intent to impose State liquor licensing laws on an Indian reservation. Rather, it is said, Section 1161 merely incorporates State

"substantive standards" in much the same way as State law is incorporated for purposes of defining federal offenses under the Assimilative Crimes Act. 18 U.S.C. § 13. This argument is facile but false. It ignores the language of the statutes, the legislative history of Section 1161, and the facts of this case.[1]

In the first place, the Assimilative Crimes Act does not rely upon or apply some vague notion of State law "substantive standards." It incorporates all of the features of the State criminal code, except in the case of a specific federal crime, and makes the State offense, in all of its particulars, a federal offense. Thus, if the Congress had intended State law to apply in this situation on the "model" of the Assimilative Crimes Act, it would have used the Act itself to accomplish this task.[2]

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[1] Among the facts ignored is that on January 9, 1965, the Mescalero Apache Tribe adopted a tribal ordinance—later approved by the Under Secretary of the Interior and published in the Federal Register (see App. F 24a-25a)—which specifically provided that the "introduction, sale and possession of intoxicating beverages shall be lawful within the Indian country under the jurisdiction of the Mescalero Apache Indian Tribe: *Provided*, that such introduction, sale and possession is in conformity with the laws of the State of New Mexico * * *." *Id.* Thus, the Tribe itself recognized the need for State regulation, and it is only the United States that refuses to do so.

[2] The manner in which Congress would have acted if it had intended full federal control and enforcement is also illustrated by one of the primary cases cited by Respondent, *Warren Trading Post Co.* v. *Arizona Tax Com'n*, 380 U.S. 685 (1965). There, the Commissioner of Indian Affairs, acting pursuant to a series of statutes, "promulgated detailed regulations prescribing in the most minute fashion who may qualify to be a trader and how he shall be licensed," the "conduct forbidden on a licensed trader's premises," and many other factors. *Id.* at 689. These were considered by this Court to be "all-inclusive regulations and statutes," which left "no room * * * for state laws imposing additional burdens upon traders." *Id.* at 690; footnote deleted. The State, therefore, simply had "no duties or responsibilities respecting the reservation Indians * * *." *Id.* at 691. Section 1161, on the other hand, does not in any way attempt to federally preempt the subject with which it deals.

If the United States were right in its interpretation, Section 1161 would pose problems of constitutional dimension. The lack of precision in the application of State law under the argument advanced by the United States would raise serious questions of due process and equal protection. The attachment of criminal liability, whether federal, State or both, in the event of an offense, requires the explicit and strict application of the governing law, as is done by the Assimilative Crimes Act, not the uncertain standard espoused by the United States with respect to Section 1161 in this case. The United States fails to explain what restrictions are imposed by State "substantive standards" and what State restrictions are excluded from application. A man of common intelligence likewise could not discern what is permissible and what is not.

Secondly, the language of Section 1161 makes no distinction between State "substantive standards" and other provisions of State law. The licensing provisions are just as much a part of the liquor laws of the State of New Mexico as are matters relating to hours of service, sales to minors, and the like. Moreover, the United States, so far as this record shows, is not even enforcing New Mexico's provisions with regard to hours of service, sales to minors, or any other matter.[3]

Thirdly, the argument of the United States that Section 1161 does not apply State law to Indian activity on an Indian reservation wholly ignores the admitted facts of this case that sales of liquor to the Mescalero Apache Tribe are made by non-Indians, that non-Indians manage the Inn and dispense liquor there, and that non-Indians

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[3] Indeed, it was the federal government's failure to enforce the prohibition laws and the consequent effect of liquor-related offenses both on and off Indian reservations which provoked the passage of Public Law 280 and Section 1161. "State Legal Jurisdiction in Indian Country" Hearings on HR 459, HR 3624, 82nd Cong., 1st Session (1952).

are the overwhelming majority of consumers of liquor at the Inn. The argument of the United States would create a class of wholesale state law violators. The text of Section 1161, which requires "conformity both with" State law and tribal ordinance, precludes this conclusion.[4]

Thus, under the circumstances of this case, the position of the United States is wholly untenable. The federal statute provides in effect that liquor regulation on Indian land shall conform with State law. The Mescaleros have adopted a tribal ordinance specifically declaring that liquor regulation on their land shall conform with State law. Yet liquor regulation on the reservation is flagrantly in disregard of State law—it is, in fact, in direct conflict with that law. The State is powerless to act without being in contempt of a federal court order which was entered at the behest of the United States, the same party that argues to this Court that no one need be concerned with State law, because the United States has sole authority to enforce it!

2. The United States either ignores or mistakes the situation in regard to liquor transported into the State. Its brief says that "Liquor transported for sale and consumption on the reservation is not brought into New Mexico 'for delivery or use therein.' The delivery and use is on the reservation and under a distinct sovereignty" (p. 9). This is simply not true. No liquor is transported across the New Mexican border designated for delivery to or use on any Indian reservation. All such liquor is transported directly to non-Indian wholesalers operating in the normal fashion within the State. These wholesalers, located *off* Indian reservations, sell primarily to

[4] Indeed, even after the passage of Section 1161, liquor could not be possessed or sold on an Indian reservation in the State of New Mexico until the Constitution of New Mexico was amended to strike the prohibition against liquor on Indian reservations, which had been required by the State's enabling act. P.L. 83-277, § 3 (App. 532-542); 36 Stat. 557, § 2 (App. 542-562).

non-Indians. To the extent that members of the Mescalero Tribe buy from these wholesalers, they buy at random from stock that has completely come to rest within the State for general sale and use.[5] Yet the effect of the injunction issued below is to prevent New Mexico from regulating this liquor that has become part of the total alcoholic beverage supply in the State, if a wholesaler happens to sell to an Indian rather than a non-Indian.

This result stands on their heads such cases as *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), which held that even Indians selling to non-Indians on their own Reservations had to collect and pay the normal State sales tax, for otherwise "* * * the competitive advantage which the Indian seller doing business on tribal land enjoys over all other cigarette retailers, within and without the reservation, is dependent on the extent to which the non-Indian purchaser is willing to flout *his* legal obligation to pay the tax" (*id.* at 482; emphasis in original). The United States would somehow use this case as an excuse to deprive the State of New Mexico of its otherwise-uninhibited power to regulate the liquor sales of non-Indian, off-reservation wholesalers whose contact with Indians is incidental at best.

[5] The Mescalero Apache Reservation is not an Arsenals and Dockyards Clause exclusive legislation enclave, such as Yosemite National Park was in *Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518 (1938), or Fort Sill in *Johnson* v. *Yellow Cab Co.*, 321 U.S. 382 (1944), or the base involved in *United States* v. *Mississippi Tax Comm'n*, 412 U.S. 363 (1963). It is within the territorial limits of New Mexico, and New Mexico's laws extend on the reservation except as precluded by Congress. *Mescalero Apache Tribe* v. *Jones, Comm'r of Revenue*, 411 U.S. 145 (1973); *United States* v. *McGowan*, 302 U.S. 535 (1938). Each of the cases ruling that the Twenty-First Amendment does not apply to exclusive legislation enclaves involved direct shipment from out of state to the enclave, so there was no intrastate traffic, no incident upon which State law would attach. *Collins, supra; Yellow Cab, supra; Mississippi Tax Comm'n, supra.*

As to these wholesalers, the rule is that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe* v. *Jones, Comm'r of Revenue, supra*, 411 U.S. at 148-149.

In sum, the United States has demonstrated in its brief why review by this Court is fully warranted, since the questions presented not only are of extraordinary importance to this and other States but are subject to sharp dispute between the parties.

Respectfully submitted,

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